Khayalilal & Anr.vs. Manohar Lal & Ors.

1. SB Civil 1st Appeal No.09/1984

Manoharlal vs. Modilal & Ors.

2. SB Civil 1st Appeal No.25/1984

Date of Order: 11th April, 2007.

PRESENT

HON'BLE MR.JUSTICE BHAGWATI PRASAD

Mr.Aslam Sheikh for Mr.Manish Shishodia for the appellant/s.
Mr.Arvind Shreemalee for Mr.D.D.Dhanvi for the respondent/s.

Heard learned counsel for the parties.

These two appeals are decided by a common judgment as the same arise out of the same judgment decided by the court of Additional District Judge, Rajsamand in civil original suit No.24/1980, dated 12th December, 1983.

The suit was filed by Manohar Lal against Lahar Bai and four others alleging inter alia that Lahar Bai owned a property. In this property there is a common wall which is being used by the plaintiff and the defendant Lahar Bai. By two different sale deeds Lahar Bai has sold the property to four brothers. Though all the four brothers are part of the same family and there should have been a

single sale deed but to defeat the right of pre-emption, different sale deeds were made. Therefore , a common suit was filed.

The principal question which has been urged before me is the decision of issue No.6:-

" आया दुकान के अन्तरण पर अग्रक्रयाधिकार लागू नहीं होता अत: यह दावा चलने योग्य नहीं है ?"

The issue relates to the right of pre-emption of common wall and shops. The trial court has held that so far as the suit relates to the shop , the right of pre-emption does not exist and against which plaintiff has filed the appeal. The right of pre-emption has been recognised by the trial court in regard to that part of the property which is not commercial. Right of pre-emption basically was sought to be adjudicated on the ground that on the East - West side , there is a common wall in between the properties of the plaintiff and the defendants. Therefore, the plaintiff has staked his claim for pre-emption. This Court in Ram Chandra vs. Manak Lal's L.R.Sajjan lal & Ors (SB Civil 1st Appeal No.75/1988) has taken a view , following another decision of this Court in Dharam Pal vs. Smt. Kaushalya Devi (RLR 1989 (2) , 826), wherein this Court has earlier held :-

“ 17. I accordingly hold that

> firstly, there is concurrent finding of fact of both the courts below that the plaintiff has failed to establish that the wall in question was a common wall. Secondly, even if it was so, the right arising thereupon are only in the nature of easementary rights (i.e. cross-easementary rights) and the position of the plaintiff is no better than a neighbor and a right of pre-emption based on such neighbor-hood or vicinage was void as held by the Supreme Court and does not revive by the omission of Article 19 (1) (f) and Article 13 (1) by the Forty Forth Constitution Amendment for the reason that the doctrine of eclipse is not applicable to it. The plaintiff's case in relation to " ahata" consequently fails."

In view of the findings contained in the decision rendered by this Court in Dharampal's cse (supra) the right of pre-emption in common wall cannot be recognised. The trial court has rightly held that right of pre-emption cannot be recognised in relation to the shop. If the right of pre-emption is not recognised then the suit has to fail and it is not necessary to go to the other aspects of the

matter.

In that view of the matter, the appeal of Khayalilal deserves to be allowed and the appeal of Manoharlal deserves to be dismissed. Consequently, the suit filed by Manoharlal stands dismissed.

(BHAGWATI PRASAD), J.

L.George